With regard to (a) the question can, at this stage, be considered only by relation to evidence available from the pleadings and affidavits. There are, I think, two questions to be answered in the present case, namely:—

(a) Does this evidence show that the defendant's marks are calculated to deceive purchasers by making them think when they are buying his goods that they are buying the goods of the plaintiff?; and

(b) Is the defendant as a result of the terms of agreement in the Singapore suit precluded from using the mark he is now using?

It is not my intention to dispose finally of this point, but at present my impression is that the answer to both questions is in the negative.

There is similarity in the marks of the plaintiff and the defendant in so far as the colour and design of the cartons or boxes in which their goods are sold. It was pointed out by the learned Counsel for the defendant that the words used in such marks (i.e. "Zam-zam" in the case of the plaintiff and "Ramzan" in the case of the defendant) have distinctive and completely different meanings. No evidence was produced on this point; it is, however, a fact that these words are not made up words for purposes of a trade mark; they are Hindustani words of Arabic origin. According to Ram Narain Lal's Student's Practical Dictionary (Hindustani-English) "Ramzan" is "the Ninth Muhammadan month during which they are interdicted from eating, drinking and conjugal duty between dawn and sunset. On the 27th of this month Quran began to descend from heaven." "Zam-zam" is the Sacred Well in Mecca (see Sir William Muir's Life of Mohamed); it is also, I believe a fairly common name amongst Hindu girls. For purposes of a trade mark, therefore, "Zam-zam" is as different from "Ramzan" as "Milkmaid Milk" is from "Bear Brand Milk." Apart and independently of this, however, there is no evidence, at this stage, that the defendant's trade mark is calculated to mislead or deceive purchasers by making them think that in buying goods of the defendant they are buying the goods of the plaintiff.

Furthermore, at present it is not possible to decide which are the true terms of settlement of the Singapore suit; this is the main point at issue between the parties; this question must therefore wait till the final hearing. If it is upheld that the true terms are those which the defendant claims to be, then it would seem that the defendant has a claim to use the trade mark he is using now.

With regard to the balance of convenience and inconvenience, I consider that the balance is in favour of the defendant and that the plaintiff's right would be sufficiently protected if the defendant undertakes to keep an account.

On the above grounds I refuse the grant of the interim injunction; the application should stand over to the hearing, the defendant being put on an undertaking to keep an account. The costs of this application to be borne by the plaintiff.

Order accordingly.

PUBLIC PROSECUTOR v. ISHAK & ORS.

[App. Crim. Juris. (Whitton, J.) July 7, 1952]

[Kota Bharu — Criminal Appeal No. 15 of 1952]

Criminal Procedure Code (Cap. 6), ss. 158 and 173(b) — Duty of Magistrate — Penal Code (Cap. 45), ss. 403 and 406.

This was an appeal by the Public Prosecutor against the acquittal of the respondents who had been charged with criminal breach of trust — alternatively with criminal misappropriation of cash. It is contended on behalf of the Public Prosecutor that the learned President, Sessions Court should have acted under section 173(b) of the Criminal Procedure Code and amended the charge.

Held, that the prosecution cannot successfully maintain that a Magistrate had failed in his duty in this matter because he did not make an amendment to a charge which they did not themselves in any way suggest and based on a legal view of the facts quite different from that they themselves have put forward throughout the case.

Case referred to:—

(1) *Public Prosecutor v. Lee Pak* (1937) M.L.J. 265; (1938) F.M.S.L.R. 1.

CRIMINAL APPEAL from Sessions Court, Kota Bharu.

Cur. Adv. Vult.

Whitton, J. : — The three respondents in this case were acquitted at the close of the Prosecution case by the President Sessions Court, Kota Bharu, on the 7th April 1952, and the Public Prosecutor appeals against this decision. The respondents were originally charged under section 409 Penal Code, but during the trial the charge was amended to one under section 406 with an alternative charge under section 403. The amended charge read as follows:—

"That you on or about the 26th day of October, 1951, at Tumpat District, State of Kelantan, being jointly entrusted with certain property, to wit, cash $15 collected for the sale of meat from an unclaimed dead calf, committed criminal breach of trust; and that you thereby committed an offence punishable under section 406 of the Penal Code.

ALTERNATIVELY —

That you, on or about the 26th day of October, 1951, at Tumpat District, State of Kelantan, jointly and dishonestly misappropriated certain property, to wit cash

$15 the proceeds of sale of meat from an unclaimed dead calf, the owner being unknown, and thereby committed an offence punishable under section 403 of the Penal Code."

The facts alleged by the Prosecution were as follows. The three respondents, who were respectively a Veterinary Police Constable, a Detective Corporal and a Police Sergeant, went together to the scene of the killing of a calf by a railway train. They failed to find the owner of the calf. The third respondent agreed to accept $15 from the local Penghulu for allowing Siamese Kampong folk to take away meat from the carcase. The Penghulu paid the first respondent $5 and the third respondent $10 and gave the second respondent two katties of the meat. The respondents failed to account to the Government Treasury for this money.

The learned President sets out these facts in his judgment, and, while he does not specifically say so, I assume from his subsequent observations that he held they had been *prima facie* established. In any event having read the record I think the facts in question can reasonably be regarded as having been *prima facie* established, and for the purposes of deciding this appeal I so regard them. It is, however, to be remembered that in consequence of the course the trial took the respondents did not have an opportunity to rebut the Prosecution evidence.

The first submission of the Deputy Public Prosecutor was that the original charge under section 409 Penal Code was good, but that it was in respect of the calf's carcase and not of the $15 that the offence was committed, and that it was the duty of the President to amend the charge accordingly. I shall for the sake of argument assume for the moment that a charge under section 409 in respect of the carcase would have been sustainable, and proceed to consider the suggestion it was the President's duty to amend the charge in the manner indicated. I cannot forbear, however, from observing that if a charge under section 409 in respect of carcase was the right one it is a pity it did not occur to the Prosecution earlier that the charge in respect of the money was not the right one. The duties of a President or Magistrate to amend the charge in the course of a summary trial are prescribed by section 173(h) Criminal Procedure Code. This sub-section reads as follows:—

"(h) If, when such evidence has been taken, the Court is of the opinion that there are grounds for presuming that the accused has committed the offence charged or some other offence which such Court is competent to try and which in its opinion it ought to try, it shall consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, shall amend the same."

To my mind the words "when such evidence has been taken" must refer to "all such evidence as may be produced in support of the prosecution" (vide section 173(c)), and, if this view is correct, the duties in question do not arise until the Prosecution case is concluded. This does not mean, however, that the charge cannot be amended at an earlier stage; on the contrary it can be amended at any time before judgment by virtue of section 158 Criminal Procedure Code. In this connection it is pertinent to quote a passage of the judgment of Whitley, J. in *Public Prosecutor v. Lee Pak*[1]:—

"It is desirable that before the charge is put to the accused the Magistrate should satisfy himself as to whether in his opinion it is on the face of it properly framed; and if at the close of the case for the Prosecution or indeed at any other stage of the trial it becomes apparent to him from the evidence that the charge should be altered, section 158 of the Criminal Procedure Code gives him power to alter it or to add to it at any time before judgment."

The position then as I see it is that a President or a Magistrate has the discretion to amend the charge at any stage of the trial, but in addition he is statutorily required to consider if amendment is necessary at the close of the Prosecution case. What precisely is he required to do? He is required to consider the charge recorded against the accused and decide whether it is sufficient and, if necessary, to amend the same. Now if he omits to do this this omission must in some circumstances, in my opinion, constitute a proper ground for reversing his decision. But I do not think the Prosecution can successfully maintain a Magistrate has failed in his duty in this matter because he did not make an amendment to the charge which they did not themselves in any way suggest and based on a legal view of the facts quite different from that they themselves have put forward throughout the case. In my opinion the learned President in the present case complied with the requirements of section 173 Criminal Procedure Code, and this ground of appeal must fail. In the circumstances I do not feel it falls within my province to give a decision on the interesting argument put forward by the learned Deputy that the disposal of the carcase in the circumstances constituted criminal breach of trust.

The learned Deputy made an alternative submission that the facts disclosed an offence under section 161 Penal Code. It is an essential element of this offence that the illegal gratification must be taken as a "motive or reward for doing or forbearing to do any official act, etc." I agree with the view that the respondents failed to carry out an official act when they did not comply with Police Regulations relative

to the matter but I do not think they accepted the gratifications as a motive or reward for not doing so. I feel sure the Siamese who paid the $15 were not in the least interested in dissuading the respondents by reward or otherwise from performing their official duties as such in respect of the calf, and that the money was accepted simply as a commercial consideration for allowing the Siamese to have the meat. This ground of appeal must also in my view fail.

The appeal is dismissed.

Appeal dismissed.

P. V. RAMAN CHETTIAR v. TAN CHOO WOO & ANOR.

[Court of Appeal (Mathew, C.J. (F.M.), Sir Charles Murray-Aynsley, C.J. (Singapore), and Wilson, J.) July 24, 1952]

[K.L. — Civil Appeal No. 39 of 1952]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 4(2)(ii) — Revaluation of a debt contracted prior to Japanese Occupation of Malaya and repaid during the Occupation — Hindu joint-family — Demand — A request and a demand — Whether any difference.

In 1940 one Lee Yuan Neo charged certain land in favour of the appellant. On January 20, 1941 the appellant made a Declaration of Trust in which he declared that the Charge was held by him in trust for a Hindu Family. The Charge was then transferred to him "as Trustee". Just prior to the Occupation he left Malaya and appointed P. L. T. Vairavan Chettiar as his Attorney. The chargor died during the Occupation and eventually the Official Administrator was appointed Administrator, the defendants in the Summons being then minors (subsequently the defendants became the Administrators). There was correspondence which showed that the beneficiaries were anxious to pay off the Charge.

It would appear that because the Official Administrator was prepared to pay off the Charge the Attorney applied to the Japanese Court for the Charge to be transferred into his name "as Trustee". Vairavan Chettiar was duly registered "as Trustee" on August 21st, 1944 and on August 23rd, 1944 he wrote to the Official Administrator, Seremban and the Public Trustee, Selangor stating that he had been registered "as Trustee" and he requested the amount due on the Charge to be paid to him. The money was duly paid and a Discharge was registered on September 25th, 1944. Vairavan Chettiar died on September 25th, 1950.

By Originating Summons No. 4 of 1951 the appellant applied to the Court and was re-appointed Trustee and the Order appointed him Trustee in respect of the Charge Presentation No. 76151; it was further ordered that the Charge be vested in him "as Trustee". The appellant then sent a notice pursuant to the provisions of section 11(3) of the Debtor and Creditor (Occupation Period) Ordinance, 1948.

It was submitted by the learned counsel for the respondents that the Order re-appointing the appellant Trustee had no effect. The Charge had been discharged on September 25th, 1944 and there was nothing which could be vested in him. If according to the provisions of the Debtor and Creditor (Occupation Period) Ordinance there could be a revaluation of the payment the land was subject to a statutory Charge created by the Ordinance but the old Charge was not revived. In consequence, when Vairavan Chettiar died, the statutory Charge formed part of his Estate and the appellant should have asked for the benefit of the statutory Charge to be transfered to him "as Trustee". This not having been done the statutory Charge if any was still in the Estate of Vairavan Chettiar.

The learned counsel further submitted that the letters written to Vairavan Chettiar which indicate that the Administrator of the Chargor was prepared to pay off the debt must be ignored because by applying to the Court and by obtaining the registration of the Charge in his name "as Trustee" he immediately became a new Creditor. As he became a Creditor on August 21st, and as he wrote the letters of demand on August 23rd, that quite clearly was a demand and the amount was paid within 3 months.

The learned trial judge held that (1) the Order of this Court bringing back the appellant into the trust deed was nugatory in that the deed had lapsed and had not been revived and therefore the appellant must be non-suited; and (2) the letter of request in this case amounted to a demand within the meaning of section 4(2)(ii) of the Ordinance.

The plaintiff-appellant appealed, and the Court of Appeal, in allowing the appeal:—

Held, per curium that (1) the Order was beyond doubt to put the plaintiff-appellant in the same position and with the same rights as the deceased trustee; (2) the letters relied on by the defendants-respondents must be considered in the light of circumstances and the rest of the correspondence, and in view of the circumstances these letters cannot be considered a demand within the meaning of the Ordinance. Per Sir Charles Murray-Aynsley, C.J. (Singapore): The Words of the Ordinance are not technical, but their purpose is clearly to distinguish between cases where a debt is repaid at the instance of the creditor and where it is repaid at the instance of the debtor.

COURT OF APPEAL, appeal against the decision of Abbot, J.

Dr. C. H. Withers-Payne for the plaintiff-appellant.

Peter Hill for the defendants-respondents.

Cur. Adv. Vult.

Mathew, C.J., (F.M.) : — This is a claim by a trustee for the re-instatement of a security under section 11(5) of the Debtor and Creditor (Occupation Period) Ordinance, 1948. The learned trial judge dismissed the claim on the ground that the plaintiff was not vested under the order of the High Court at Seremban dated the 31st January, 1951, with the right to prosecute this claim and that such right was vested in the administrator of the estate of one Vairavan Chettiar the former trustee who had died. I am not in agreement with this proposition. It is true that the terms of the order are not as clear as they might be, but the intention of the order was beyond doubt to put the plaintiff in the same position and with the same rights as the deceased trustee. The learned trial